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Order 2001-12-1



UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Issued by the Department of Transportation
on the 3rd day of December 2001

Expedia, Inc.

**Violations of 49 U.S.C. § 41712
and 14 CFR 399.84**

Served December 3, 2001

CONSENT ORDER

This consent order concerns the failure of Expedia, Inc., an Internet travel vendor, properly to include fuel surcharges, where applicable, in certain fares on its website. The omission of these surcharges violated the full-price advertising requirements of section 399.84 of the Department's rules (14 CFR 399.84) and, in addition, violated 49 U.S.C. § 41712, the statutory provision that is the basis for that consumer protection rule. This order directs Expedia to cease and desist from future similar violations and to pay a compromise civil penalty.

Under 14 CFR 399.84, fare advertisements by air carriers or their agents must state the full price charged the consumer. A primary intent of the rule is to ensure that consumers are given accurate and complete fare information on which to base their airline travel purchase decisions, and to avoid having them learn of additional charges, which should have been disclosed initially, only in the later stages of buying their tickets. As we have indicated in prior consent orders, these requirements apply to advertisements on Internet sites.¹

As a matter of long-standing enforcement case precedent, the Department has allowed taxes and fees collected by carriers and other sellers of air transportation, such as passenger facility charges (PFCs) and departure taxes, to be stated separately in fare advertisements so long as the charges are approved or levied by a government entity, are not *ad valorem* in nature, are collected on a per-passenger basis, and their existence and amount are clearly indicated in the advertisement so that the consumer can determine the full

¹ See, e.g.: *Northwest Airlines Violations of 49 U.S.C. 41712 and 14 CFR 399.84*, Order 99-8-23; *Delta Air Lines*, Order 97-7-24; *American Express Travel Related Services Company, Inc.*, Order 96-11-19.

price to be paid. However, any fuel surcharges, as well as *ad valorem* taxes or any additional carrier or vendor fees, must be included in the advertised fare.

On Expedia's website, the violations of the full-price requirement occurred on a flexible-date search feature, known as the "Fare Calendar" path, in which consumers did not specify travel dates but merely requested the lowest fares in a city-pair market. The flexible search path produced a fare display in which a fuel surcharge was mentioned at the bottom of the display together with other applicable charges. The footnote stated that a fuel surcharge might apply, but the consumer could not determine whether it in fact did apply to a particular purchase until he or she went on to the booking page. The booking page, which the prospective purchaser reached after selecting specific flights, did, however, display a fare that included the fuel surcharge, so that the consumer could not actually book a flight without seeing the full fare. Nonetheless, the flexible-date search path did violate the requirements of section 399.84, and was deceptive and unfair, by failing to include the fuel surcharges in the fare displayed on the first screen that stated a price for the air transportation involved.²

In mitigation, citing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980), Expedia claims that the Department's interpretation of section 399.84 is inconsistent with the First Amendment since the information conveyed on the site was accurate, though incomplete. Moreover, Expedia points out that it merely displays data obtained from ATPCO, an industry clearinghouse for the collection and publication of fare data, which in turn receives its fare data from participating carriers. According to Expedia, the manner in which the carriers file their fare data, which does not include fuel surcharges in the base fare, renders the carriers and ATPCO in part responsible for the omission of the fuel surcharges.³ The company asserts that there exists a widespread pattern of non-compliance with the full-fare advertising rule among retail travel agents generally and that, even if its site failed to comply with the Department's rule, Expedia's brief period of non-compliance was hardly exceptional in the industry.⁴ The

² Expedia's initial fare screen also excluded a number of other government surcharges, fees and taxes that may be excluded from advertised fares under our enforcement case precedent; however, the amount of these additional charges (or a range of amounts) was not provided, as required. Expedia states that it has reviewed its website and corrected this problem. With this correction, the Enforcement Office believes, Expedia has corrected the advertising problems discovered during its investigation which are discussed in this order.

³ In Order 2001-5-32, a consent order against US Airways, the Department recognized that carriers whose fares are advertised on the Internet are liable for the accuracy of the fare disclosures on their own sites and share such responsibility on sites of their agents.

⁴ The Office of the Assistant General Counsel for Aviation Enforcement and Proceedings is currently investigating several other internet travel agencies with respect to their compliance with the full-fare advertising rule and has recently settled several other cases involving fare presentations and the full-fare advertising requirements. See, e.g. Orders

company also points out that it has nonetheless brought its website into full compliance with section 399.84. The vendor notes that technical difficulties prevented it from correcting the discrepancies more promptly. Despite these delays in amending its displays, Expedia contends that the actual consumer harm was minimal since the bookings actually made through its "Fare Calendar" feature were less than one percent of the vendor's total bookings. Expedia states that at considerable expense it reprogrammed its site to include the appropriate fare disclosures within three months of receiving notice from the Department regarding the deficiency.

We consider any advertisements which do not comply with the full fare disclosure requirements to be a violation of both section 41712 and section 399.84, and we believe that enforcement action is warranted in this instance. Expedia, for its part, in order to avoid litigation and without admitting or denying the alleged violations, agrees to the issuance of this order to cease and desist from future violations of 49 U.S.C. § 41712 and 14 CFR 399.84 on its Internet site and to an assessment of \$40,000 in compromise of potential civil penalties. Of this total penalty amount, \$20,000 shall be paid according to the payment schedule set out in the ordering paragraphs below. The remaining \$20,000 shall be suspended for one year following issuance of this order, and then forgiven, unless Expedia violates this order's cease and desist provision within that one-year period, or fails to comply with the order's payment provisions, in which case the entire unpaid portion of the \$40,000 penalty shall become due and payable immediately, and Expedia may be subject to further enforcement action. This compromise assessment is appropriate in view of the nature and extent of the violations in question and serves the public interest. This settlement, moreover, represents a deterrent to future noncompliance with our advertising regulations and section 41712 by Expedia, as well as by other sellers of air transportation.

This order is issued under the authority contained in 49 CFR 1.57a and 14 CFR 385.15.

ACCORDINGLY,

1. Based on the above discussion, we approve this settlement and the provisions of this order as being in the public interest;
2. We find that Expedia, Inc., violated 14 CFR 399.84 by advertising fares on its Internet site which failed to include all applicable surcharges, fees and taxes, as described above;

3. We find that by engaging in the conduct described in paragraph 2, above, Expedia, Inc., violated the provisions of 49 U.S.C. § 41712;
4. Expedia, Inc., is ordered to cease and desist from further similar violations of 14 CFR 399.84 and 49 U.S.C. § 41712;
5. Expedia, Inc., is assessed \$40,000 in a compromise of civil penalties that might otherwise be assessed for the violations described in ordering paragraphs 2 and 3, above. Of that penalty amount, \$20,000 shall be paid in two equal installments. The first payment of \$10,000 shall be due and payable within 30 days of the service date of this order; the second payment shall be due and payable one year following the service date. The remaining \$20,000 shall be suspended for one year following service of this order, and then forgiven, unless Expedia, Inc., violates this order's cease and desist provisions within the one-year suspension period, or fails to comply with the order's payment provisions, in which case the entire unpaid portion of the \$40,000 penalty shall become due and payable immediately, and Expedia may be subject to further enforcement action; and
6. Payment shall be made by wire transfer through the Federal Reserve Communications System, commonly known as "Fed Wire," to the account of the U.S. Treasury. The wire transfer shall be executed in accordance with the instructions contained in the Attachment to this order. Failure to pay the penalty as ordered shall also subject Expedia, Inc., to an assessment of interest, penalty, and collection charges under the Debt Collection Act, and possible enforcement action for failure to comply with this order.

This order will become a final order of the Department 10 days after its service date unless a timely petition for review is filed or the Department takes review on its own motion.

BY:

ROSALIND A. KNAPP
Deputy General Counsel

(SEAL)

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(1) To 021030004	(2) Type		
(3) From		(4) Ref.	(5) Amount
(6) Ordering Bank and Related Data			
(7/8) TREAS NYC/CTR/OST			
(9) BNF=/AC-69010005 OBI=			
(10) Payor			
(11)			

1. Treasury Department Code—Provided
2. Type Code—To be provided by sending bank.
3. Sending Bank's Code—(ABA#)
4. Reference No.—Optional number, entered if sending bank desires to number transaction.
5. Amount—Include dollar sign and punctuation including cents digits.
6. Sending Bank Name—Telegraphic abbreviation corresponding to Item 4.
- 7/8. Entire line provided precisely as shown.
9. Entire line provided precisely as shown.
10. Enter name of air carrier or other payor (as shown on order).
11. Identify payment (maximum 80 digits). Enter order number (if any), issue date, and state "installment" or "full payment."

NOTE: Questions about these instructions should be directed to Yash Parekh, Office of Financial Management, Accounting Services Division, TBP-24, Rm 9422, DOT, phone: (202) 366-5760, fax: (202) 366-7163. To ensure proper credit, notify Mr. Parekh when each payment is made.